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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

ON MOTION FOR LEAVE TO FILE COMPLAINT

REPLY BRIEF FOR PLAINTIFF

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JURISDICTION

The original jurisdiction of this Court has been invoked, pursuant to Article III, Section 2, Clause 1, of the Constitution of the United States, and 28 U.S.C. § 1251.

QUESTIONS PRESENTED

1. Should South Dakota's Motion For Leave To File A Complaint be granted for the reason that the United States Supreme Court is the only Court which has complete jurisdiction over the State of South Dakota and the State of Nebraska in an action to determine state jurisdiction of an island which has formed in the middle of the Missouri River which forms the boundary between said states.

2. Should South Dakota's Motion For Leave To File A Complaint be denied on the basis of Nebraska's assertion that South Dakota has long acquiesced in the exercise of exclusive sovereignty over the island.

STATEMENT

In its brief, the State of Nebraska has submitted factual data in an attempt to demonstrate that the State of Nebraska has long exercised exclusive jurisdiction over the island in question. Based upon that factual data, the State of Nebraska argues at great length that South Dakota has conceded any claim of right to the island by acquiescence. However, as will hereinafter be set forth, the State of South Dakota has recognized and asserted its dominion over the island for a number of years.

Before setting forth the specific incidents wherein South Dakota has exercised jurisdiction over Rush and/or Elk Island, the development of the island should be reviewed to assist the Court in understanding the limited nature of the jurisdiction asserted by the State of Nebraska. The island, as it now exists, contains approximately 1,000 acres and consists of several islands which were formed at different times and accreted

together. The southeast corner of the island would encompass a part of the original situs of Island No. 1, which later became known as Rush Island. Island No. 1 was surveyed in 1862 and was described as containing 132.60 acres. It was found in the survey to be a part of the territory of Nebraska. At the time of the survey, the main channel of the river flowed to the north of that island, although by 1893 the main channel had shifted and flowed to the south of the island. During the early part of this century, the original Island No. 1 diminished in size or disappeared altogether. Shortly before the turn of the century, several small islands emerged from the river in the vicinity of Island No. 1. During the 1930's and 1940's, these islands accreted together to form two separate islands, one of which now constitutes the northern portion of Elk and/or Rush Island and the other which constitutes the southern portion of that island. It was not until the early and middle 1950's that the two islands joined together to form the island as it now exists. Prior to approximately 1955, the northern portion of the island was sandy, partially flooded, and unfit for any practical use.

The State of Nebraska has assessed and collected real property taxes on "one" of the islands that now constitute Elk and/or Rush Island for a number of years. Until recent times, neither Nebraska nor South Dakota collected real property taxes for the remaining islands which have been in existence for a number of years and now constitute the major portion of Elk and/or Rush Island.

In 1909, the records of Cedar County, Nebraska indicate that 160.1 acres of "Rush Island" were assessed in Nebraska and 100 of those acres were described as "in river." Apparently, the "Rush Island" referred to was Island No. 1, claimed by

Nebraska pursuant to the 1862 survey. In 1913, only 60 acres of the one island were assessed in Nebraska. From 1917 to 1933, a mere 10 acres of "Rush Island" were assessed in Cedar County, Nebraska, despite the fact that a substantial portion of the 1,000 acres of what is now Elk and/or Rush Island had surfaced by that time in the form of two large islands and several smaller ones. From 1934 up to and including 1938, no part of "Rush Island" was assessed in Nebraska. Arguably, Nebraska did not assess any part of the island during those five years since the original Island No. 1 had completely washed away. From 1939 to 1953, 230 acres were assessed in Nebraska. Between 1953 and 1956, the assessment records indicate that the number of acres assessed in Nebraska was reduced to 140. The records further reveal that only 10 acres had accreted to the island over those years. During that period of time, almost all of the present island had come into existence in the form of one relatively large island to the north, one relatively large island to the south, and several smaller islands. It was not until 1957, (about the time of the Nebraska quiet title action), that Nebraska assessed and collected real property taxes on the entire land mass constituting Elk and/or Rush Island. In that year, and up to the present, Nebraska has assessed and collected real property taxes on 980 acres of the island.

During the same period that Nebraska has assessed and collected real property taxes for the entire island, South Dakota has also exercised jurisdiction over the island. Notwithstanding the affidavit of Martin A. Slemp, attached to the Defendant's brief (See App. 41), wherein he states that for the past thirty years he cannot find where Yankton County, South Dakota "has levied any taxes upon it (Elk and/or Rush Island)," South Dakota has levied and collected taxes for personal property on

the island since 1955. Henry Huntley, who resided on the northern portion of the island from 1955 to 1960, paid personal property taxes to Yankton County, South Dakota during that entire period of time. Taxes were also assessed and collected by Yankton County, South Dakota between 1959 and 1965 from Charles and Shirley Broz for their personal property when they resided on the northern portion of the island. Moreover, Kenneth Sudbeck, who currently resides on the island, and has so resided for the past two years, also paid personal property taxes to Yankton County for his personal property situated on the island for the years 1975 to 1976. The same Kenneth Sudbeck purchased South Dakota license plates for his automobile in 1975 and 1976 and is registered to vote in Yankton County, South Dakota.

South Dakota peace officers have also exercised dominion and control over the island. In January of 1959, one LeRoy Blakey was murdered on the island. Ed Sampson of the Yankton County, South Dakota sheriff's office and the South Dakota Department of Criminal Investigation, a division of the South Dakota Attorney General's Office, fully investigated the matter from the beginning and the South Dakota Division of Criminal Investigation has continued the investigation to the present. Therefore, the affidavit of Ed Sampson, attached to the Defendant's brief (See App. 49), wherein he states that while he was sheriff of Yankton County from 1957 to 1967, "his office exercised no dominion or control over Rush or Elk Island," is not altogether accurate. It should also be noted that Nebraska law enforcement officials were not involved in this investigation at any time.

The Yankton County Sheriff's Office has exercised juris-

diction over the island on several other occasions. Approximately one year ago, the present sheriff of Yankton County went to the Sudbeck residence on the island in response to a complaint about a dog. Also in 1975, a shot was fired in the vicinity of Yankton County Deputy Sheriff, Dave Hunnoff, while he was patrolling the island. Deputy Hunnoff has also in the past recovered a missing boat and motor from the island. In 1969, Yankton County Sheriff, Jeff Scott, recovered stolen property from a building located on the island.

In addition, South Dakota game wardens have long asserted South Dakota dominion over the island. South Dakota Game Warden, Bill Shadick, regularly patrolled the island for game violations while he was stationed in Yankton County from 1964 to 1971. During that period of time, he patrolled the island at least once each month, and more frequently during hunting seasons. At least one individual arrested by Warden Shadick was convicted in South Dakota courts for game violations on the island. Depite his extensive patrolling of the island, Warden Shadick has never observed a Nebraska game warden on the island. Warden Shadick is also aware of numerous South Dakota residents who have hunted on the island.

Ron Katlin, a South Dakota game warden in Yankton County from 1971 to the present, has also patrolled the island for game violations. Warden Katlin, like Warden Shadick, has never observed a Nebraska game warden on the island. In the past, he has placed the island under observation because of numerous poaching complaints. Additionally, he has recovered and returned to the island a number of owls that had been illegally removed from the island.

The Yankton County, South Dakota school system has educated the children of at least three families that resided on the island. From 1955 to 1961, the children of Henry Huntley attended Yankton schools without paying non-resident tuition. The children of former island resident Charles Broz attended school in Yankton County as residents of the South Dakota school district from 1961 to 1965. Leslie Logan, another former resident of the island, sent one of his children to the Yankton schools from 1955 to 1959. His child, like the Broz and Huntley children, received their education tuition free in South Dakota.

The State of Nebraska has attached to their brief a letter, dated August 18, 1965, from a former South Dakota Assistant Attorney General (See App. 43 and 44), wherein the Assistant Attorney General stated that in his opinion "certain land" (presumably Elk and/or Rush Island) is situated within the boundary of Nebraska. Based upon this letter, Nebraska insinuates in its brief that South Dakota has expressly recognized its lack of jurisdiction over the island. However, it should be noted that the unofficial opinion contained in that letter was based on facts presented to the Assistant Attorney General by Yankton County Director of Equalization. The letter does not indicate what facts were submitted and formed the basis of the opinion. In any event, as heretofor indicated, South Dakota has continued to exercise dominion and control over the island despite the issuance of that letter.

ARGUMENT

I

SOUTH DAKOTA'S MOTION FOR LEAVE TO FILE A COMPLAINT SHOULD BE GRANTED FOR THE REASON THAT THE UNITED STATES SUPREME COURT IS THE ONLY COURT WHICH HAS COMPLETE JURISDICTION OVER THE STATE OF SOUTH DAKOTA AND THE STATE OF NEBRASKA IN AN ACTION TO DETERMINE STATE JURISDICTION OF AN ISLAND WHICH HAS FORMED IN THE MIDDLE OF THE MISSOURI RIVER WHICH FORMS THE BOUNDARY BETWEEN SAID STATES.

In Nebraska's brief in opposition to South Dakota's motion for leave to file its complaint, Nebraska argues that this Court should not exercise its original jurisdiction because the state courts in both South Dakota and Nebraska have held, in law suits involving private parties, that the land herein controversy, lies within Cedar County, Nebraska, and for the further reason, that there is presently pending a quiet title action in the First Judicial Circuit of South Dakota that Nebraska contends is the appropriate forum to decide this dispute. However, neither the case law cited by Nebraska, nor sound reasoning supports their position.

Nebraska's entire argument is based upon one premise—that the Circuit Court of the First Judicial Circuit of the State of South Dakota in the quiet title action presently stayed pending this action, and the District Court of Cedar County, Nebraska in a prior private quiet title action, have the jurisdiction to determine where the boundary between two states should be. However, in *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S.Ct. 301,

62 L.Ed. 638 (1918), this court affirmed the principle that state court dispositions of boundary locations between states are in each case limited by the interstate boundary and cannot be permitted to press back the boundary line from where it otherwise should be located.

It is true, that state courts may determine whether they have subject matter jurisdiction of land that is involved in a boundary dispute, and if such a state court decides that it does have subject matter jurisdiction, it may proceed to decide the case; however, as was emphasized in *Durfee* v. *Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963), at 193:

> Nothing there decided, (a quiet title action in Nebraska involving private parties), and nothing that could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them, or as to the respected sovereignty over the land in question. . . . Either state may at any time protect its interest by initiating independent judicial proceedings here. . (Emphasis added.)

Therefore, the boundary dispute between Nebraska and South Dakota in the case at bar, can only be decided by a decision from this Court.

In its brief in opposition, Nebraska has cited cases, not dealing with state boundary disputes, for the proposition that this Court should exercise its jurisdiction sparingly. However, a review of the state boundary dispute cases decided by this

Court indicates that traditionally, this Court has applied a much less restrictive standard in accepting jurisdiction over state boundary disputes than other types of state controversies. Furthermore, as is evidenced by the recent boundary dispute case of *Mississippi* v. *Arkansas*, 415 U.S. 289, 94 S.Ct. 1046, 39 L.Ed.2d 333 (1974), this Court has shown its willingness to accept cases involving boundary disputes between states after a state court has stayed further proceedings in a pending quiet title action until a final determination of the boundary issue was decided by the United States Supreme Court.

Even if South Dakota was able to overcome the stay now ordered by the South Dakota Court and successfully prevail in the pending quiet title action, Nebraska could not be made a party and therefore would have no interest in, or right to ask for certiorari under 28 U.S.C. Section 1257 (3). As a result, this boundary dispute would remain unsettled. If South Dakota was to follow the procedure outlined by Nebraska, the pending South Dakota quiet title action would result in nothing more than another meaningless judgment in the growing list of suits arising out of this disputed boundary.

A review of this Court's cases makes it clear that neither the pending South Dakota quiet title action nor any previous quiet title actions can bind both states to a boundary in this matter. The only way in which the State of Nebraska will be compelled to observe the true boundary between the states, is to have this matter decided by this Court. Because Nebraska contends the entire island lies within its boundaries, and because South Dakota contends that the vast majority of the island is within South Dakota's boundaries, this case clearly involves a controversy between the states within the meaning of

Article III, Section 2 of the Federal Constitution, and as this Court is the only place in which the states can get adequate relief. The original, exclusive jurisdiction of this Court should be exercised.

II

SOUTH DAKOTA'S MOTION FOR LEAVE TO FILE A COMPLAINT SHOULD NOT BE DENIED ON THE BASIS OF NEBRASKA'S ASSERTION THAT SOUTH DAKOTA HAS LONG ACQUIESCED IN THE EXERCISE OF EXCLUSIVE SOVEREIGNTY OVER THE ISLAND.

This Court has repeatedly held that where two states recognize and acquiesce in a particular boundary line over a long course of years, the states are bound to that boundary line, even if it is later ascertained that the line so recognized varies from the original and true boundary. See for example, *New Mexico* v. *Colorado*, 267 U.S. 30, 45 S.Ct. 202, 69 L.Ed. 449 (1925); and *New Jersey* v. *Delaware*, 291 U.S. 361, 54 S.Ct. 407, 78 L.Ed. 847 (1933).

However, the State of South Dakota submits that this rule is not applicable to the present situation. Based upon the facts presented herein, it cannot be said that South Dakota has long recognized and acquiesced in a particular boundary, or that Nebraska has exercised exclusive dominion over the property in question. Instead, the facts merely show that Nebraska taxed one of the islands that now constitute Elk and/or Rush Island for a period of time; that prior to 1957, neither state levied nor collected real property taxes over the remaining islands that now form the major portion of Elk and/or Rush Island; that after the several individual islands accreted together (including

the island taxed over the years by Nebraska) to form the present 1,000 acre island, Nebraska began, in 1957, to assess and collect real property taxes for the entire island; that the only other act whereby Nebraska exercised jurisdiction over the island occurred in 1973 when the sheriff of Cedar County, Nebraska served process on a resident of the island; and that South Dakota has exercised jurisdiction over the island by collecting personal property taxes for property located on it, providing police protection for the island, patrolling the island for game violation, educating the children of residents of the island, and the other acts heretofor mentioned in the Statement contained in this brief.

CONCLUSION

Based upon the foregoing, the State of South Dakota respectfully requests this Court to grant the previously filed Motion For Leave To File A Complaint.

Dated at Pierre, South Dakota, on this 22nd day of September, 1976.

Respectfully submitted,

STATE OF SOUTH DAKOTA, *Plaintiff,*

BY: _____

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CERTIFICATE OF SERVICE

Service of Reply Brief For Plaintiff, was made this 22nd day of September, 1976, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to the following individuals:

Paul Douglas	J. James Exon
ATTORNEY GENERAL	GOVERNOR
State Capitol	State Capitol
Lincoln, Nebraska	Lincoln, Nebraska

In addition, I hereby certify that all parties required to be served have been served.

Dated this 22nd day of September, 1976.

DONALD D. FOREMAN
Assistant Attorney General
State of South Dakota